No. 80-1136

In the Supreme Court of the United States

October Term, 1980

WILLIAM H. DRUMMOND,
Petitioner,

vs.

LOUIS A. STAHL and MARY K. STAHL, Husband and Wife and STREICH, LANG, WEEKS, CARDON & FRENCH, a Professional Association,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF ARIZONA

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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INDEX

CONCLUSION 3

TABLE OF AUTHORITIES

Dennis v. Sparks, ... U.S. ..... (No. 79-1186) 3, 4
Gertz v. Robert Welch, Inc., 418 U.S. 323 3
Gibbes v. Zimmerman, 290 U.S. 326 3
New York Times v. Sullivan, 376 U.S. 254 3

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The state court clothed Respondents with *two* "absolute" common law privileges:

—to maliciously and without any cause, initiate court proceedings (a matter which Respondents' Brief ignores);

—to maliciously and without any cause, initiate bar association disciplinary proceedings.

1. There *was* a "sizable" fact issue in the trial court as to Stahl's state of mind. But that issue has *evaporated.* The state court of appeals affirmed the trial court's summary judgment *despite* this "sizable fact element." To do this the state court of appeals had to ignore the fact issue and apply these *"absolute"* privileges *without regard* to the facts.

The "sizable fact element," noted by Respondents[1] is not before this court. There is no reason germane to the issues raised by the Petition why this straw issue should have even been *mentioned* in Respondents' Brief.

2. The *federal questions* raised by Petitioner—the propriety of the state granting these privileges in the face of the Fourteenth Amendment—*have never been decided by this court.*

Moreover, as Respondents admit,[2] there is a *clear division of authority at the state level.*

These uncertainties—wholly *apart* from the state's denial of Petitioner's Fourteenth Amendment rights—clearly favor grant of certiorari. The *effects* of such uncertainties on the length, cost and complexity of both civil and criminal litigation are horrendous.[3]

Respondents' Brief fails to meet this "public" question, except to opine that the court below was *"probably"* right.

3. To determine whether state recognition of a privilege presents a federal question, one need look no further than the single case cited in Respondents' Brief.[4]

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1. Respondents' Brief, Par. 1.

2. Respondents' Brief, Par. 2.

3. In the present case, 8-10 months delay and over $100,000. (Petition, p. 6)

4. Respondents' Brief, Par. 3.

Gertz v. Robert Welch, Inc., 418 U.S. 323, and its predecessor cases (e.g., New York Times v. Sullivan, 376 U.S. 254) stand *squarely* for the proposition that the state's power to grant or withhold privileges to defendants in state common law actions are tempered, in fact *controlled*, by the Constitution.

And see *Gibbes v. Zimmerman*, 290 U.S. 326 (cited in the Petition) where a state statute purporting to grant absolute immunity to state banks against creditor's suits was held not to violate due process. This result was reached, however, *contrary* to the present case, *only* because the state provided *another remedy* which preserved to the creditors the *same substantive rights*. In the present case Petitioner was denied any remedy at all contrary to the Fourteenth Amendment.

CONCLUSION

On the *private* issues of this case Respondents have glossed over the merits, relying on the palpably incorrect argument that "this was purely a state question to decide," heedless of the Constitutional commands of due process.

On the *public* issues Respondents rest on the argument that the state court was "probably" correct.[5]

We believe that the "do-some-private-harm-for-the-greater-public-good" argument, advanced by Respondents, was effectively rejected on close facts by this court in *Dennis v. Sparks*, ... U.S. ..... (No. 79-1186).

In *Dennis* the defendants, as here, were private parties who had wrongfully initiated court proceedings. The de-

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5. A position which was apparently not shared by two of the five sitting justices of the Supreme Court of Arizona (Petition, A23).

fendants in *Dennis*, as here, were acting under color of state law and sought, as here, absolute privilege.

The Court stated:

> . . . the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury upon other persons.

On both the private and the public issues, the Petition should be granted.

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